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CLEARINGHOUSE RULE 98-083

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Section Comm 83.01 provides that ch. Comm 83 establishes “minimum” standards and criteria for the regulation of private on-site wastewater treatment systems (POWTS). The statutory authority for ch. Comm 83, in ss. 145.02 (2) and 145.13, Stats., does not include the word “minimum” in relation to the Plumbing Code. These statutes have for many years been interpreted by the department and its predecessors to require a uniform statewide plumbing code. This interpretation of the statute is made clear and unambiguous by the legislative history, in which the word “minimum” was stricken from both of these statutes by Ch. 194, Laws of 1971. This provision of the rule and ss. Comm 83.32 (2) (b) and 83.40 (intro.), are contrary to the statutory mandate.

b. The department has included a determination in s. Comm 83.03 (4) (b) that it is not technically or economically feasible for a POWTS to comply with the preventive action limits for chloride. This determination may be relevant for several different purposes under ch. 160, Stats. The department should clearly state the regulatory consequence of this determination within the statutory framework of the groundwater law.

c. In s. Comm 83.22 (5), the department is attempting to limit any responsibility it may have based on its decisions in the process of approving plans. Under existing statutory and case law, the department, as a state agency, enjoys a number of limitations on liability, including for actions of its employees or agents done within the scope of their responsibility. If this provision is a restatement of current law, it is unnecessary. If this provision is an attempt to extend the department’s immunity for its actions, the department should determine clearly whether it has statutory authority to do so.

d. The rule establishes a “range of responses” for purposes of the groundwater law in Table 83.29. Has the department considered, in preparation of this range of responses, the mandatory requirements of s. 160.21 (3) and (4), Stats.? The responses listed in Table 83.29 are expressed in general terms and do not reflect any of the details called for in the statute.

The range of responses in Table 83.29 is a single list, which presumably applies to concentrations of substances in excess of either a preventive action limit or an enforcement standard. Although the groundwater law does not require separate lists of responses, the department may wish to consider whether the mandate of the groundwater law can better be met with a separate range of responses for concentrations of substances in excess of a preventive action limit and an enforcement standard. The statute suggests the appropriateness of this by requiring regulatory responses for attaining or exceeding a preventive action limit or an enforcement standard in separate paragraphs in s. 160.21 (1), Stats. Also, the regulatory responses required by ss. 160.23 and 160.25, Stats., are not the same.

When an enforcement standard is attained or exceeded, s. 160.25 (1) (a), Stats., requires, as the primary regulatory response, prohibition of the activity or practice. This requirement is not explicitly included in Table 83.29.

The reason for promulgation of regulatory responses under s. 160.21, Stats., is to determine, in advance, the responses that the regulatory agency may take under ss. 160.23 and 160.25, Stats., if a preventive action limit or an enforcement standard is attained or exceeded. Only two of the responses in the table (related to issuing orders) can be said to constitute a regulatory response for a specific facility, although those provisions are expressed in such general terms that they do not provide information about the potential actions that must be taken by a property owner if a POWTS causes the concentration of a substance in groundwater to attain or exceed a preventive action limit or an enforcement standard.

Chapter 160, Stats., does not explicitly require groundwater monitoring for individual facilities, although regulatory agencies often require monitoring. Section Comm 83.54 (2) (b) and (e) authorize the department to require monitoring, but these provisions do not indicate the conditions under which monitoring may be required and are not clear as to whether the monitoring is to be required for contaminants in groundwater. If monitoring is not required, how will the department determine if a POWTS complies with the groundwater law? Has the department consulted with the Department of Natural Resources concerning management practice monitoring under s. 160.27, Stats., with respect to a POWTS?

The point of standards application under s. Comm 83.29 (2) corresponds with the point of standards application in s. 160.21 (2) (b), Stats., in which monitoring is not required for the facility. However, s. Comm 83.54 (2) provides that the department may require monitoring. If monitoring is required for a facility, the point of standards application provisions of s. 160.21 (2) (a), Stats., should apply.

2. Form, Style and Placement in Administrative Code

a. Table 2.65 sets fees for the plan review of private on-site wastewater treatment systems. There should be no gaps between the categories. For example, the table sets a fee for

a proposed system that treats 1,000 gallons per day or less and sets a separate fee for a system that treats 1,001 to 2,000 gallons per day. The second category should be labeled as a system that treats more than 1,000 gallons per day and not more than 2,000 gallons per day in order to avoid any controverseys regarding the rounding of figures between 1,000 and 1,001 when imposing a fee.

b. The definition in s. Comm 81.01 (89) refers to “the code.” Should this be a reference to the defined term, the “state plumbing code”?

c. In s. Comm 83.02 (2) (c), the cross-reference should read “chs. NR 108, 110, 206 and 218.” Also, in sub. (2) (f) 1. c., the notation “ss.” should be replaced by the notation “s.”

d. In s. Comm 83.21 (3) (c) 2., the first sentence should be renumbered as sub. (a) and the remaining subparagraphs should be renumbered accordingly.

e. The Note after s. Comm 83.23 (3) (b) appears to establish a substantive statement that should be included in the rule.

f. The defined term “failing private on-site wastewater treatment system” should be used in s. Comm 83.24 (2) (b).

g. Section Comm 83.44 (3) (b) 2. provides information, rather than establishes a regulatory requirement, and should be redrafted as a note.

h. In s. Comm 83.45 (5), the notation “s.” should be inserted before the reference to “Comm 83.22.”

i. In s. Comm 84.10 (3) (c) (intro.), the cross-reference should read “chs. Comm 81, 82 and 83, this chapter and ch. 145, Stats.” [See also sub. (3) (e) 1. and (f).]

j. In s. Comm 85.20 (1) (b) Note, the underscoring should be removed. Also, in sub. (2) (b) 1. b., c. and d., the notation “s.” should be inserted before the cross-references to “Comm 85.30 (1) (c).”

k. In s. Comm 85.60 (3), the first sentence should be renumbered as par. (a) and the remaining paragraphs renumbered accordingly. Also, in the first sentence, the word “through” should be replaced by the word “to.”

l. Section Comm 85.60 (3) contains two paragraphs numbered par. (g).

m. Section Comm 85.60 (4) (d) 4. and (d) 3. refer to an appendix. Where is the appendix? Also, sub. (5) (intro.) should conclude with a colon rather than a period.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Cross-references to chs. 144 and 147, Stats., such as in s. Comm 81.01 (13) and other places in the rule, should be changed to reflect current statutory numbering.

b. Does the term “interim” in s. Comm 81.20 (3) have a precise meaning? Are there amendments other than “interim” amendments that will take effect before the Plumbing Code is revised?

c. Section Comm 85.60 refers to various forms. The department should ensure that the requirements of s. 227.14 (3), Stats., are met.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. Typographical errors noted:

(1) Comm 2.66 Table 2.66, line 5: “wastewater” is misspelled.

(2) Comm 5.36 (3) (b): “as a” is duplicated.

(3) Comm 81.01 (117): “that” should be replaced by “which.”

(4) Comm 82.10 (8): a space should be inserted before “treatment.”

(5) Comm 83.02 (2) (d) 2.: “engineered” is misspelled.

b. Should “registration” be inserted after “provider” in s. Comm 5.36 (3) (intro.)?

c. In s. Comm 5.36 (3) (a) (intro.), “are relative” should be replaced with “relate.”

d. “Humus” is used in s. ILHR 20.07 (19m) and several provisions in the rule. This term is defined in the rule as the product of bacterial digestion of human wastes and organic kitchen wastes, although this term, in geographical science as well as common usage, means a component of soil.

e. The definition in s. Comm 81.01 (3) refers to the treatment of “wastewater” and the definition in s. Comm 81.01 (8) refers to the treatment of “waste and wastewater.” Is there any reason for the difference?

f. “Application rate” does not appear to be a technical term and is not a term that should ordinarily require a definition. The definition in s. Comm 81.01 (10) is confusing, because the definition refers to the movement of liquid *into* a soil surface, which suggests a term such as “absorption,” rather than “application.”

g. The definition of “appurtenance” in s. Comm 81.01 (11) is not particularly clear, because “adjunct” is no more precise than “appurtenance.”

h. The term “backflow” includes the reverse flow of liquids, solids or gases. However, as this term is used in the rule, it appears to apply only to the reverse flow of liquids. Are there in fact provisions in the rule that refer to the reverse flow of solids or gases?

i. The definition of “dispersal” in s. Comm 81.01 has the same problem as the definition of “application rate.” The defined term does not match the definition. [See also, s. Comm 81.01 (180).]

j. In Note 3 after s. Comm 83.02 (1), in the statutory quotation, “department” should be followed by “[of natural resources].”

k. The phrase “require that the modification” in s. Comm 83.03 (1) (b) is superfluous. Also, in the Note after that paragraph, “impact” should be replaced by “affect” and the department should consider whether some guidance should be included on how to determine what is the “appropriate edition” of the “code.”

l. Section Comm 83.03 (2) (a) should commence: “This chapter does not apply”

m. “Entities” is used in s. Comm 83.20 (1) (b). It is not clear what this word means.

n. It appears that “format” should be replaced by “form” in s. Comm 83.21 (6) (a) 1. and the Note after that subdivision. Also, should the Note refer to “a copy of” the application rather than “further information relative to” the application?

o. Section Comm 83.32 (1) (a) 2. and 3. repeat provisions that are included earlier in the rule.

p. “Frequency” should be deleted in s. Comm 83.54 (3) (b).

q. In s. Comm 83.55 (1) (a), the word “their” should be replaced by the phrase “the owner’s.” [See also sub. (1) (b) and s. Comm 85.60 (1) (a) 1.]